

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHN R. CHAVERS,	)	No. CV-05-228-CI
	)	
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR APPOINTMENT OF
v.	)	COUNSEL, MOTION FOR CHANGE
	)	OF VENUE, MOTION FOR MEDICAL
MAGGIE MILLER-STOUT, et al.,	)	INVESTIGATOR, AND MOTION FOR
	)	EXTENSION OF TIME AND
Defendants.	)	ADDENDUM OF COMPLAINT; WITH
	)	DIRECTIVE
	)	
	)	----- ACTION REQUIRED -----

Before the court are Plaintiff's renewed Motion for Counsel, Motion for Change of Venue, Motion for Appointment of Medical Investigator, and Motion for Extension of Time and Permission for Addendum to Complaint. (Ct. Rec. 31, 45, 46, 49.) Plaintiff, a prisoner currently housed at Athanum View Corrections Complex (AVCC) in Yakima, Washington, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12133, and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). (Ct. Rec. 11.) Plaintiff is appearing pro se; Defendants are represented by Assistant Attorney General Amanda Migchelbrink. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 36.) The motions were consolidated and heard before the undersigned without oral argument on October 6, 2006.

ORDER DENYING PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL, MOTION FOR CHANGE OF VENUE, MOTION FOR MEDICAL INVESTIGATOR, AND MOTION FOR EXTENSION OF TIME AND ADDENDUM OF COMPLAINT; WITH DIRECTIVE - 1

1 **A. Motion for Counsel (Ct. Rec. 31).**

2 On June 30, 2006, Judge Van Sickle denied, with leave to renew,  
3 Plaintiff's initial Motion for Appointment of Counsel. (Ct. Rec.  
4 30.) Plaintiff filed the instant renewed Motion for appointment of  
5 counsel on July 5, 2006, citing unfamiliarity with the discovery  
6 process and lack of access to a law library as a basis for  
7 appointment of counsel (Ct. Rec. 31.)

8 A district court has the discretion to appoint counsel to  
9 represent an indigent civil litigant. 28 U.S.C. § 1915(e); *Wilborn*  
10 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). However,  
11 "exceptional circumstances" must exist to warrant appointment of  
12 counsel in civil actions for damages. *Wilborn*, 789 F.2d at 1331.  
13 *See also, United States v. McQuade*, 579 F.2d 1180, 1181 (9<sup>th</sup> Cir.  
14 1978). In assessing exceptional circumstances, two factors must be  
15 viewed together: the likelihood of success on the merits and the  
16 ability of the plaintiff to articulate his case in light of the  
17 complexity of the case. *Wilborn*, 789 F.2d at 1331.

18 Here, Plaintiff has not yet demonstrated a likelihood of  
19 success on the merits. Lack of experience and education in the law  
20 and difficulties presented by the discovery process do not  
21 constitute exceptional circumstances. *Wilborn*, 789 F.2d at 1331.  
22 Plaintiff has been articulate in presenting his claims in the  
23 Complaint and later pleadings. Further, the case does not present  
24 issues of substantial complexity.

25 Regarding access to a law library, although AVCC does not have  
26 a law library, the Department of Corrections provides legal access  
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1 to AVCC inmates with pending lawsuits by transporting them to a  
2 facility with a law library as soon as possible after the prisoner  
3 notifies his corrections counselor of his need. (Ct. Rec. 34, Ex.  
4 1, Declaration of Patricia McNeil.) A prisoner's constitutional  
5 right to legal access does not require a particular element. A  
6 prisoner must have a meaningful opportunity to litigate his action,  
7 but there is no right to a law library at every correctional center.  
8 "[P]rison law libraries and legal assistance programs are not ends  
9 in themselves, but only the means for ensuring 'a reasonably  
10 adequate opportunity to present claimed violations of fundamental  
11 constitutional rights to the court.'" *Lewis v. Casey*, 518 U.S. 343,  
12 351 (1996); see also *Bounds v. Smith*, 430 U.S. 817, 832, 97 S.Ct.  
13 1491 (1977). Based on the record currently before the court, the  
14 AVCC gives Plaintiff adequate access to a law library. Further,  
15 Plaintiff makes no showing that he has suffered any actual injury  
16 due to the AVCC legal access policy. *Lewis*, 518 U.S. at 351-52.  
17 The file demonstrates that he has been able to adequately present  
18 his case. Plaintiff's dissatisfaction with AVCC's policy providing  
19 access to a law library does not create exceptional circumstances.

20 As Plaintiff has not demonstrated exceptional circumstances at  
21 this time, his Motion for Counsel is **DENIED, with leave to renew.**

22 **B. Mediation.**

23 The court notes from a review of the Complaint allegations,  
24 that what Plaintiff ultimately seeks, consistent with state  
25 regulations, is a separate cell, rather than a shared cell, to  
26 assist him with his hygiene, as he is a paraplegic whose bowel care

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1 requires him to manually remove his feces with rubber gloves. For  
2 a variety of proffered reasons, in addition to privacy and dignity,  
3 Plaintiff believes for the health and safety of all cell mates, a  
4 separate cell is necessary. In addition, Plaintiff seeks referral  
5 to a specialist in spinal condition injuries. Without prejudging  
6 the case, it appears these are matters that might be amenable to  
7 resolution by the parties through an early mediation. If the  
8 parties are agreeable to referral by the court to a local rule  
9 volunteer mediator, the parties shall notify the court by filed (and  
10 served by mail) **written submissions within two weeks of the date of**  
11 **this Order.** If this matter is referred for mediation, the court  
12 will attempt to locate a volunteer attorney to assist Plaintiff for  
13 the temporary and limited purpose of communicating with the defense  
14 during negotiations and mediation. If mediation fails, Plaintiff  
15 may renew his motion for appointment for purposes of additional  
16 representation.

17 **C. Motion for Change of Venue (Ct. Rec. 45).**

18 Plaintiff bases his request for a change of venue to Yakima,  
19 Washington, on the following allegations: (1) it would be more  
20 convenient for him, (2) DOC would refuse to transfer him back to  
21 AVCC after the trial, and (3) "the residents of Spokane hold a  
22 personal enmity" against him that would preclude an unbiased jury in  
23 Spokane. He also alleges that the Spokane media would "turn the  
24 proceedings into a media circus." (Ct. Rec. 45.)

25 A change of venue for federal civil actions is governed by 28  
26 U.S.C. § 1404. A district court has the discretion to grant a  
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1 change of venue for "the convenience of parties and witnesses, and  
2 in the interest of justice." 28 U.S.C. § 1404 (a). Plaintiff  
3 asserts that a trial in Yakima, Washington, would be more convenient  
4 for him. Defendants respond that changing venue from Spokane to  
5 Yakima would inconvenience the witnesses located in Spokane County  
6 and the parties, with the exception of Plaintiff. A change of venue  
7 is not warranted where the alleged wrongdoing took place at Airway  
8 Heights Correctional Center in Spokane County, and Defendants and  
9 witnesses are primarily located in Spokane County. Plaintiff does  
10 not demonstrate how a change of venue would be more convenient for  
11 the other parties or witnesses.

12 Plaintiff's allegation that a change of venue to Yakima is  
13 necessary because DOC will probably place him in a "multi-man cell"  
14 in Spokane and refuse his return to AVCC, is unsupported by facts or  
15 argument. Likewise, his assertion that it will be impossible to  
16 find an unbiased jury in Spokane is speculative and unsupported by  
17 facts. The *voir dire* process in jury selection is designed to  
18 identify potential jurors who know of Plaintiff's crime and/or hold  
19 enmity towards him. Further, jurors are selected from additional  
20 counties in the Eastern District of Washington, not just Spokane  
21 County. Regarding prejudice caused by media coverage, Plaintiff  
22 must show a reasonable likelihood that inflammatory publicity  
23 immediately before trial warrants a change of venue. A factual  
24 account in the media, without a demonstration of "a huge wave of  
25 public passion," does not warrant a change in venue. *Casey v.*  
26 *Moore*, 386 F.3d 896, 907 (9<sup>th</sup> Cir. 2004). Plaintiff's speculation  
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1 that the media in Spokane will prejudice his trial, without more, is  
2 insufficient to warrant a change of venue. Plaintiff has not  
3 demonstrated that a change of venue is in the interests of justice;  
4 therefore, his Motion for Change of Venue (**Ct. Rec. 45**) is **DENIED**,  
5 **with leave to renew** if facts develop to support the motion.

6 **D. Motion for Medical Investigator (Ct. Rec. 46).**

7 Plaintiff's claims against Defendants allege cruel and unusual  
8 punishment and deliberate indifference in Defendants' treatment of  
9 his spinal cord injury and resultant pain. Plaintiff requests the  
10 court to appoint a medical investigator in the area of spinal cord  
11 injuries and treatment to review his medical records while  
12 incarcerated in DOC facilities. The court construes this as a  
13 motion for court-appointed expert pursuant to FED. R. EVID. 706, under  
14 which the court may enter an order to show cause why an expert  
15 witness should not be appointed, and may ask the parties to submit  
16 nominations. FED. R. EVID. 706(a). The expert to be appointed under  
17 Rule 706 is a neutral expert, appointed to assist the court at the  
18 court's discretion. The court's decision to appoint an expert is  
19 reviewed for abuse of discretion. *Walker v. American Home Shield*  
20 *Long Term Disability Plan*, 180 F.3d 1065, 1071 (9<sup>th</sup> Cir. 1999).

21 The claims in the Plaintiff's Complaint allege violations of  
22 Plaintiff's Eighth Amendment rights. Plaintiff does not explain in  
23 what way a court-appointed expert to review his medical records  
24 would assist the court in these proceedings at this time. Discovery  
25 has not been completed, dispositive motions have not been filed and  
26 considered. At this point in the proceedings, the court does not

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1 require the views of a neutral expert. Accordingly, Plaintiff's  
2 Motion for a court-appointed expert (Ct. Rec. 46) is **DENIED, with**  
3 **leave to renew.**

4 **E. Motion for Extension of Time and Permission for Addendum to**  
5 **Complaint (Ct. Rec. 49).**

6 On August 28, 2006, Plaintiff filed an "Addendum to Complaint"  
7 purporting to add parties and facts to his Complaint. (Ct. Rec.  
8 51.) On September 7, 2006, Plaintiff filed a Motion for Extension  
9 of Time and Permission for Addendum to Complaint (Ct. Rec. 49) and  
10 on September 12, 2006, he filed a "Notice of Hearing" set for  
11 October 6, 2006, without oral argument. The court construes these  
12 filings as a Motion to amend complaint pursuant to FED. R. CIV. P. 15.

13 A plaintiff may amend his complaint after a defendant files a  
14 responsive pleading or after a trial date is set "only by leave of  
15 court or by written consent of the adverse party; and leave shall be  
16 freely given when justice so requires." FED. R. CIV. P. 15(a).  
17 However, if a proposed amendment is futile, causes undue delay, is  
18 motivated by bad faith or causes prejudice to the opposing party,  
19 leave to amend should be denied. *United States v. Pend Oreille*  
20 *Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 (9<sup>th</sup> Cir. 1991).  
21 Defendants have filed their Answer (Ct. Rec. 15) and a trial date  
22 has been set. (Ct. Rec. 41.)

23 Rule 15 also allows for the filing of supplemental pleadings  
24 "setting forth transactions or occurrences or events which have  
25 happened since the date of the pleading sought to be supplemented"  
26 with permission of the court. FED. R. CIV. P. 15 (d).

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1 Plaintiff proposes in his Addendum to add "Chana White, Carla  
2 Journagan, Dr. Gondo" as parties, based on actions they took at AVCC  
3 in Yakima, Washington, where Plaintiff has been housed since on or  
4 about March 7, 2006. (Ct. Rec. 51 at 3; Ct. Rec. 22.) The  
5 information included in Plaintiff's proposed Addendum is unrelated  
6 to the alleged facts and claims presented in the Complaint. The  
7 parties work at AVCC, and the facts alleged appear to have taken  
8 place in Yakima County. Venue would be proper in Yakima County  
9 instead of Spokane County. A separate complaint should be filed to  
10 address these unrelated claims. Further, the proposed Addendum does  
11 not allege constitutional violations and is insufficient to  
12 supercede the Complaint; therefore, at this time, the proposed  
13 amendment appears to be futile. See *Loux v. Rhay*, 375 F.2d 55, 57  
14 (9<sup>th</sup> Cir. 1967); *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9<sup>th</sup> Cir.  
15 1956). Upon consideration of these factors, Plaintiff's Motion for  
16 leave to amend his Complaint (Ct. Rec. 49) is **DENIED without**  
17 **prejudice**. Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Counsel (Ct. Rec. 31) is **DENIED,**  
20 **with leave to renew.**

21 2. Plaintiff's Motion for Change of Venue (Ct. Rec. 45) is  
22 **DENIED, with leave to renew.**

23 3. Plaintiff's Motion for Appointment of Medical Investigator  
24 (Ct. Rec. 46) is **DENIED, with leave to renew.**

25 4. Plaintiff's Motion for Extension of Time and Permission  
26 for Addendum to Complaint (Ct. Rec. 49) is **DENIED, without**  
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1 **prejudice.**

2 5. Within two weeks of the date of this Order, the parties  
3 shall file and serve a written statement of whether they are willing  
4 to participate in mediation with a volunteer mediator.

5 The District Court Executive shall file this Order and provide  
6 a copy to Plaintiff and counsel Defendants.

7 DATED October 27, 2006.

8  
9 S/ CYNTHIA IMBROGNO  
10 UNITED STATES MAGISTRATE JUDGE  
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